

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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NATIONAL ASSOCIATION OF LETTER	:	
CARRIERS, BRANCH 124, AND NATIONAL	:	
ASSOCIATION OF LETTER CARRIERS AFL-	:	Case Nos. 15-CB-084264
CIO (UNITED STATES POSTAL SERVICE),	:	15-CB-095238
	:	
Respondents,	:	
	:	
- and -	:	
	:	
DEBORAH RUTHERFORD, AN INDIVIDUAL,	:	
	:	
Charging Party.	:	
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**REPLY BRIEF OF RESPONDENTS NATIONAL ASSOCIATION OF LETTER
CARRIERS, AFL-CIO AND BRANCH 124, NALC IN SUPPORT OF EXCEPTION**

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PRELIMINARY STATEMENT

In our brief in support of the Union's exception, we showed that the Board has held over many years that letter carriers temporarily assigned to management (known as 204b's) are statutory supervisors under Section 2(11) of the Act who do not enjoy the protections of the Act, and that Rutherford was a supervisor at the time the Administrative Law Judge found that she was refused a copy of the collective bargaining agreement by the Branch.

In response, Counsel for the General Counsel argues that: supervisory status is an affirmative defense which should have been raised in the Union's Answer; the Union's exceptions did not preserve the issue; the Union acknowledged that it was required to provide her with a copy of the agreement; and that the Union did not establish she was a supervisor, while studiously avoiding discussion of Board law establishing that 204b's are supervisors. We address these contentions in turn.

ARGUMENT

A. The Charging Party's Status as a Statutory Employee Is Not an Affirmative Defense But an Element of the Charge

In urging that the Union was required to affirmatively plead that Rutherford was a supervisor, Resp. Br. at 4,¹ Counsel for the General Counsel cites to two cases, *Harco Trucking LLC*, 344 N.L.R.B. 478 (2005) and *Dayton Newspapers, Inc.*, 339 N.L.R.B. 650 (2003). Neither case holds that supervisory status must be plead as an affirmative defense. Indeed, Rule 102.20 does not identify *any* matter as an affirmative defense which must be plead in an answer. While the Bench Book of the Division of Judges at Section 3-600 and 3-700 list various affirmative

¹ Counsel for the General Counsel's Answering Brief to Exception of Respondents National Association of Letter Carriers, AFL-CIO and National Association of Letter Carriers Branch 124 to Decision By Administrative Law Judge, dated January 16, 2015 is cited as "Resp. Br." throughout.

defenses, supervisory status is not one of them. That is because the General Counsel must establish that the charging party is a statutory employee to establish a violation of Section 8(b)(1)(A) and (2) of the Act. Supervisors under Section 2(11) of the Act are not statutory employees under Section 2(3) of the Act.

In paragraph 10 of the Complaint (GC-1(o)), General Counsel alleged that the Branch violated its duty to “said employee [Rutherford] and the Unit.” That allegation was denied. Answer (GC-1(q) paragraph 10). The issue was preserved.

B. The Union Properly Filed an Exception to the ALJ’s Decision

Counsel for the General Counsel contends that the Union’s exception to the ALJ’s holding that the Union violated Section 8(b)(1)(A) of the Act by failing to give Rutherford the agreement upon request. (Resp. Br. at 4-5). The Union does not take exception with the ALJ’s findings based on his assessment of witness credibility on this issue. Thus, it is accepted that Rutherford requested the agreement and her shop steward failed to provide it. But the ALJ made no specific finding that Rutherford was an employee at the time. Thus, it is impossible to see how the Union can be faulted for objecting to the conclusion that failing to provide the agreement violated Section 8(b)(1)(A).

C. The Union Did Not Admit It Was Obligated to Provide Rutherford a Copy of the Agreement While She Worked in Management

Counsel for the General Counsel seizes upon shop steward Ancar’s testimony that had she asked for the agreement, he would have told Rutherford to consult the JCAM (U-6) which reproduces it. (Resp. Br. at 6). From this Counsel infers that the Union “recognized and conceded that Rutherford was similarly situated to other carrier craft employees.” (*Id.*). It did no such thing: Rutherford was a supervisor classified and paid at a higher, management level at the time. While she continued to accrue letter carrier seniority, she was not a statutory employee

at the time, as the Board has held. Refusing to give her the agreement on demand did not violate the Act for that reason, as previously shown and discussed below.

D. Rutherford Was a Supervisor

We showed that for many years the Board has found that letter carriers temporarily assigned to 204b supervisory positions in the Postal Service, as Rutherford was, are supervisors within the meaning of Section 2(11). *See Postal Service*, 302 N.L.R.B. 701, 703 (1991) (citing to *Letter Carriers*, 240 N.L.R.B. 519, 519 (1979) (finding that 204b's have "the same authority as permanent supervisors and can discipline employees and adjust grievances on behalf of the Postal Service")). As the Board concluded in *Letter Carriers*, once a letter carrier "becomes a temporary supervisor, he is no longer an 'employee' within the meaning of Sec. 2(3) of the Act" and thus is not protected by Section 8(b)(1)(A). 240 N.L.R.B. 519, 523 n.18.

Counsel for the General Counsel ignores this authority. This is fatal to its position that the Union violated the Act as found by the ALJ: 204b's are supervisors, not Section 2(3) employees.²

² Here, and in any event, the record was undisputed that as a temporary 204b supervisor, Rutherford could issue discipline to letter carriers. (Tr. at 136 (Bart)). She also participated in the resolution of at least one grievance (Tr. at 533-34 (Rutherford)) and performed street observations (Tr. at 524 (Rutherford)). These duties or responsibilities are sufficient to establish supervisory status under Section 2(11).

CONCLUSION

The Union's exception should be sustained.

Dated: New York, New York
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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of February 2015, I served a copy of the foregoing document by first-class mail upon:

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